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In the Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL., PETITIONERS

v.

ROBERT W. KELLEY, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in ruling that Supreme Court precedent prohibited the district court from excluding grades K-4 from the mandatory transportation provisions of a school desegregation plan notwithstanding the district court's findings that inclusion of these grades would produce unacceptable educational, social and economic costs.

2. Whether the court of appeals erred in ruling that the district court was required by *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), to use the system-wide ratio of black to white enrollment in fashioning a desegregation plan.

TABLE OF CONTENTS

Page

Interest of the United States 1

Statement 2

Reasons for granting the petition 9

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Alexander v. *Holmes County Board of Education* 396 U.S. 19 1

Brown v. *Board of Education:*
347 U.S. 483 ..... 1, 8
349 U.S. 294 1

Columbus Board of Education v. *Penick,*
443 U.S. 449 2

Cooper v. *Aaron,* 358 U.S. i 1

Davis v. *Board of School Commissioner,*
402 U.S. 33 9-10

Dayton Board of Education v. *Brinkman:*
433 U.S. 406 ..... 2, 8
443 U.S. 526 2

Estes v. *Metropolitan Branches of Dallas NAACP,* 444 U.S. 437 2

Green v. *County Shcool Board,*
391 U.S. 430 ..... 1, 10

Keyes v. *School District No. 1,*
413 U.S. 189 1

Page

Cases—Continued:

Maxwell v. *County Board of Education*, 203 F. Supp. 768, aff'd, 301 F.2d 828, rev'd in part sub nom. *Goss* v. *Board of Education*, 373 U.S. 683 2

Milliken v. *Bradley*: 418 U.S. 717 ..... 1, 14
433 U.S. 267 10

Pasadena City Board of Education v. *Spangler*, 427 U.S. 424 ..... 1-2, 4, 8, 14

Pullman-Standard v. *Swint*, No. 80-1190 (Apr. 27, 1982) 12

Runyon v. *McCrary*, 427 U.S. 424 1

School Board v. *State of Board of Education*, 412 U.S. 92 1

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 ... 1, 7, 8, 9, 10, 12, 13, 14

United States v. *Ortiz*, 422 U.S. 891 4

Wright v. *Council of Emporia*, 407 U.S. 451 ..... 1, 14

Statutes:

Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 1981 *et seq.* :

Title IV, 42 U.S.C. 2000c-2 2
Title VI, 42 U.S.C. 2000d 2
Title IX, 42 U.S.C. 2000h-2 2

Equal Educational Opportunities Act of 1974, 20 U.S.C. (& Supp. IV) 1701 *et seq.* 2

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INTEREST OF THE UNITED STATES

The United States has participated either as a party or as an amicus curiae in most school desegregation cases the Court has heard on the merits. See, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955); *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Wright* v. *Council of Emporia*, 407 U.S. 451 (1972); *School Board* v. *State Board of Education*, 412 U.S. 92 (1973); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976); *Dayton Board*

of Education v. *Brinkman*, 433 U.S. 406 (1977); 443 U.S. 526 (1979); *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U.S. 437 (1980). Our interest in these cases stems from our authority to enforce federal civil rights laws that prohibit school districts from denying persons an equal educational opportunity on the basis of race. Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000c-2; 2000d; 2000h-2; Equal Educational Opportunities Act of 1974, 20 U.S.C. (& Supp. IV) 1701 *et seq.*

STATEMENT

1. Black school children commenced a class action school desegregation suit against the Board of Education of the City of Nashville in 1955. In the late 1950's the district court approved and the court of appeals affirmed (270 F.2d 209, cert. denied 361 U.S. 924 (1959)) a grade-a-year desegregation plan. A separate suit was filed against the Davidson County Board of Education in 1960 and a similar desegregation plan was approved for that system. See *Maxwell* v. *County Board of Education*, 203 F. Supp. 768 (W.D. Tenn. 1960), aff'd, 301 F.2d 828 (6th Cir. 1962), rev'd in part sub nom. *Goss* v. *Board of Education*, 373 U.S. 683 (1963). In 1963 the city and county school systems merged and both suits were consolidated. No significant action occurred for six years.

2. In 1970 the district court ordered the Metropolitan County School Board to devise a comprehensive school desegregation plan for the Nashville metropolitan area in view of the failure of the previous plans to achieve desegregation.[1] After rejecting a plan proposed by the Board, the

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[1]The racial composition of the school district at that time was approximately 75% white and 25% black. Nearly 81% of all white students attended schools that were more than 90% white and 67% of all black children attended schools that were more than 90% black (Pet. App. A-199).

court approved, with some modifications, a plan proposed by the United States Department of Health, Education, and Welfare that established 15 to 35% as the "ideal student racial ratio" for each school in the district (Pet. App. A-69). The techniques used to achieve that ratio of black students in each school (geographic zone changes, clustering, and contiguous and non-contiguous pairs) required the Board to bus approximately 13,000 more students (about 14% of the total student population) than were previously bused (*id.* at A-69 to A-70). No pupil reassignments, however, were required in 33 schools located on the periphery of the county because the district court found that it was not feasible to include them in the plan (*ibid.*). Both parties appealed and the court of appeals affirmed the plan in all respects (*id.* at A-179). This Court denied certiorari (409 U.S. 1001 (1972)).

After remand, plaintiffs again sought modification of the plan on the ground that it placed a disparate burden on black children (Pet. App. A-77). For the most part, black children in grades 1-4 were bused out of the inner city to attend suburban elementary schools while white students were bused into the inner city for grades 5-6 (*id.* at A-83 to A-88). Plaintiffs also asked the court to hold the Board in contempt for constructing schools and making other changes in student assignments without prior court approval (*id.* at A-76 to A-77).

These motions were not considered until 1979 when the district court held hearings on desegregation within the system since 1971 (Pet. App. A-38). The court found that the 1971 plan had encouraged "white flight" to schools on the perimeter of the district where race conscious pupil

assignments had not been required, thereby producing significant resegregation (*id.* at A-44). The court concluded that "[t]he resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a *de jure* segregation" (*id.* at A-45).[2] The Board was therefore ordered to submit a new desegregation plan that encompassed the entire metropolitan area.

3. In May 1980 the district court entered an opinion and order rejecting parts of the Board's proposed plan and specifying changes that needed to be made to obtain court approval (Pet. App. A-62). The Board's initial plan was similar in many respects to the 1971 plan, except that all schools in the metropolitan area were required to reassign students for purposes of racial integration.[3] The court acknowledged that the proposed plan would achieve "an initial racial mix in which blacks will, in nearly all cases, be in the minority" (*id.* at A-109), but it nevertheless rejected certain aspects of the plan. The court concluded that the School Board need not utilize a four-tiered rather than a three-tiered grade structure solely to facilitate racial balance. The court noted that the four tiered structure of

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[2]The district court's finding of continued de jure segregation, based as it is on the "good faith efforts of the School Board in the implementation of the Court's order * * *" (Pet. App. A-4 to A-5), is problematic. See *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). Petitioners did not, however, contest the district court's finding of continued de jure segregation on appeal. That finding, therefore, is not at issue here. See, e.g., *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

[3]The plan proposed use of a four-tiered educational system (grades 1-4, 5-6, 7-8, and 9-12), with black students in grades 1-4 being bused to suburban elementary schools and white students being bused into inner city schools in grades 5-6. This structure was necessary in order to achieve a black enrollment in most schools that reflected the system-wide percentage of black students (32%), plus or minus 20% (Pet. App. A-82 n.31, A-86).

the Board's proposed plan was selected "against [the Board's] better educational judgment," and it therefore permitted the Board to revert to the preferred three-tiered structure (*id.* at A-116). The court further ordered the Board to "construct its first tier of kindergarten through early elementary grades" using schools "of a neighborhood character" (*id.* at A-116 to A-117). The court held that schools in the middle tier should have the objective "of bringing about a minimum presence of at least 15 percent of either race in the minority at each middle school" (*id.* at A-117). The court also ordered the Board to devise remedial and inter-cultural programs for grades K-4, with the funds saved by reduced transportation needs applied to the costs of these programs (*id.* at A-124 to A-125).

The court found that its modification of the Board's proposal was justified by nine years of experience under the 1971 plan as well as several days of testimony and hundreds of exhibits bearing on the educational, social and economic costs associated with the techniques embodied in the Board's proposed plan (Pet. App. A-108 to A-116). The court found that "white flight" was a "significant problem" in Nashville as a result of the 1971 plan (*id.* at A-110) and that by the late 1980's private schools would enroll 25 to 30% of elementary age children in the metropolitan area (*ibid.*). The court concluded that previous efforts to achieve a desegregated school system had been "less than fruitful, if not to some extent counterproductive" (*id.* at A-111) and that the Board's plan was "uniformly predicted to engender further exodus from the public school system" (*id.* at A-114).

The Board's proposed plan was found to place a disparate burden on young black children by requiring them to leave their neighborhoods in the early primary grades while white children remained in their neighborhoods during those years (Pet. App. A-113). The court found that the

distances young black children had to travel to their assigned schools created "an almost impossible barrier to liason between parent and teacher" (*ibid.*). The court also noted that the Board's use of non-contiguous school attendance zones in the early grades prevented children from participating in extracurricular activities (*id.* at A-115). The court questioned whether the plan's emphasis on achieving system-wide racial ratios required too many concessions to sound educational practices in the early grades. The Board, for example, chose a four or five-tiered grade structure rather than "the educationally preferred three-tiered system" in order to achieve racial balance (*ibid.*). A three-tiered system, the court noted, allows greater continuity in the instruction offered children in the early grades (*ibid.*). The court finally noted that "[t]he allocation of a finite amount of resources to transportation costs rather than educational improvement" was an inherent part of the Board's proposed plan (*ibid.*). The court concluded that reallocating those resources to reducing pupil-teacher ratios rather than busing students would produce substantial educational benefits (*ibid.*).

4. The Board modified its proposed desegregation plan in light of the district court's order and submitted it for court approval in 1981 (Pet. App. A-128 to A-129). The modified plan included certain educational components (such as remediation and black studies programs) not provided for in the earlier plan; it established 75 neighborhood attendance zone elementary schools for grades K-4 or K-5;[4] and it projected that most middle schools and high schools would fall within the court's 15% desegregation standard by 1984. The district court approved the Board's modified plan

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[4]The revised plan contemplates that students assigned to 31 elementary schools will be able to walk to school. Under the plan currently in operation, there are only five walk-in elementary schools (Pet. App. A-146).

and ordered implementation of the interim provisions of that plan. That order was stayed by the court of appeals pending appeal (Pet. App. A-155) and this Court refused to vacate the stay (*id.* at A-157).

4. On appeal, the court of appeals (Celebrezze, J., dissenting in part) affirmed in part and reversed in part (Pet. App. A-1). The court approved the educational components of the modified plan (*id.* at A-5 to A-6), but it rejected the pupil assignment components of the revised plan for two reasons.

First, it held that, as a matter of law, this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971), rendered inappropriate the use of 15% of either race as a "starting point" for devising a desegregation plan in a system that was 68% white and 32% black (Pet. App. A-6 to A-7). The court ruled that *Swann* required the district court to use the system-wide black-white pupil ratio as the "starting point" (*id.* at A-9) and it ordered the district court on remand to use that ratio (plus or minus a 15% deviation) in revising the pupil assignment provisions of the plan (*id.* at A-10).

Secondly, the court of appeals labelled as "fundamental error" and "unconstitutional" that provision of the plan that zoned grades K-4 on a neighborhood basis (Pet. App. A-12). It rejected the district court's findings regarding the educational benefits of the neighborhood school system on the ground that under *Swann* such benefits "cannot outweigh the constitutional requirement to desegregate the schools" (*id.* at A-14). It directed the district court on remand to include these children in a non-neighborhood pupil assignment program "except where inclusion would 'risk the health of the children or significantly impinge on the educational process' within the meaning of *Swann*" (*id.* at A-19).

Judge Celebrezze dissented from the majority's treatment of the pupil assignment provisions of the plan because he believed the majority did not adequately address the district court's findings of fact (Pet. App. A-26). He concluded that *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417-418 (1977), made it incumbent upon the majority to reject the district court's findings only if they are clearly erroneous; the court of appeals should not reverse the district court merely because it is " 'vaguely dissatisfied with the limited character of the remedy which the district court ha[s] afforded plaintiffs' " (Pet. App. A-31 to A-32). He also concluded that *Swann* allowed district courts discretion to exempt certain grades from the pupil assignment provisions of a desegregation plan where, as here, the district court made extensive, well-supported factual findings regarding the likely failure of a busing program that included these grades (*id.* at A-34 to A-35). Judge Celebrezze also disagreed with the majority's interpretation of *Swann* on the use of racial ratios. He read *Swann* to permit rather than to require a district court to use a system-wide ratio in devising a desegregation remedy (*id.* at A-33) and he expressed the fear that the majority's order would, as a practical matter, create a right to a particular racial balance in all schools in violation of *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 434 (1976) (Pet. App. A-34). Lastly, Judge Celebrezze faulted the majority for failing to give proper weight to the district court's evaluation of the effectiveness of certain desegregation remedies (*id.* at A-35 to A-37). He concluded, after a careful reading of the entire record, that the district court had complied with the dictates of *Swann* and *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and that it had not abused its discretion in fashioning the desegregation plan (Pet. App. A-35 to A-37).

REASONS FOR GRANTING THE PETITION

This case presents questions of fundamental importance concerning the proper interpretation to be given *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). The court of appeals, without holding clearly erroneous any of the district court's findings concerning the educational, social and economic costs of requiring mandatory transportation in grades K-4, ruled that these factors could not, as a matter of law, justify the refusal to use this desegregation technique for those grades. It also rejected the middle school and high school desegregation plans, despite their effectiveness in desegregating those schools. because the district court had not used the system-wide ratio of black and white students as the "starting point" in fashioning those components of the plan. As noted by Judge Celebrezze in dissent, however, *Swann* does not foreclose the district court from considering educational, social and economic costs in fashioning relief nor does it require the district court to use a system-wide racial ratio in the manner prescribed by the court of appeals.

1. "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 15. But this Court has never stated that this objective must be achieved regardless of the costs to individual students or the educational system as a whole. Rather, the "task * * * is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution" (402 U.S. at 16). In balancing those interests, moreover, the district courts must be guided by their "basic sense of fairness" and by their sense of what is "feasible," "workable" and "realistic" (402 U.S. at 31). They must also take "into account the practicalities of the situation."

Davis v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971). "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). The court's function is to " 'desegregate an *educational* system in which the races have been kept apart, without, at the same time losing sight of the central *educational* function of the schools.' " *Milliken* v. *Bradley*, 433 U.S. 267, 280 n.15 (1977), quoting *Milliken* v. *Bradley*, 418 U.S. 717, 764 (1974) (White, J., dissenting) (emphasis in original).

Swann does not mandate the use of any particular remedial device but instead indicates in general terms which devices are permissible and what the limits on their use might be. For example, the Court held that the pairing and grouping of noncontiguous school zones was a "permissible tool," but the Court also recognized that there are limits as to "how far a court can go" in using this device (402 U.S. at 28-29). The Court emphasized that when the travel time or distances made necessary by the use of desegregation techniques becomes so great as to "either risk the health of the children or significantly impinge on the educational process," the courts should restrict their use (402 U.S. at 30-31). The Court also acknowledged that the age of the children being transported is perhaps the most important factor to be considered in evaluating the feasibility of a desegregation plan requiring transportation (402 U.S. at 31).

In this case, the district court attempted to balance several conflicting interests in fashioning a proper desegregation remedy for grades K-4. Since its inception, the plaintiffs had maintained that the 1971 desegregation plan placed a disparate burden on black children in grades 1-4 by requiring them to be bused out of their neighborhoods to

predominantly white suburban schools while white children attended neighborhood schools and were not bused to inner city schools until grades 5-6 (Pet. App. A-77 to A-88). The Board's proposed plan continued that same objectionable busing pattern. Plaintiffs, moreover, adduced evidence to show that black children were being deprived of certain educational benefits that white children enjoyed by virtue of their proximity to their schools (see *id.* at A-136).[5] In addition, the court found that the present plan and the Board's proposed plan would inevitably result in an increase in "white flight" (*id.* at A-110 to A-111). When faced with this evidence and plaintiffs' demands for a greater number of predominantly black schools (*id.* at A-7 to A-98), the court concluded that it was not constitutionally obligated to use desegregation techniques that would necessitate the transportation of students in grades K-4. Instead, the court implemented a neighborhood school system that sought to eliminate the effects of past discrimination by means of intercultural exchange and intervention-remediation programs (*id.* at A-140 to A-145).

The court of appeals simply ignored the extensive cost/benefit analysis undertaken by the district court in fashioning its desegregation plan and instead directed the court to reinstitute mandatory transportation for grades K-4. The court of appeals did not rule that the district court's findings regarding the educational benefits of neighborhood schools and the significance of "white flight" were clearly erroneous, nor did it take issue with the district court's finding that

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[5]These benefits included better continuity between kindergarten and the early grades (Pet. App. A-132 to A-133); greater opportunities for parent-teacher communication and parental involvement in school programs (*id.* at A-115); and opportunities for participation in extracurricular activities (*ibid.*). These benefits may be of special importance to blacks because their reading scores were found to lag substantially behind the reading scores of white students in the district (*id.* at A-112 n.46).

the Board's proposed plan (and by necessary implication the 1971 plan) placed a disparate burden on black children. The court of appeals' decision, therefore, severely restricts a district court's ability to assess the effectiveness of an earlier decree in light of experience and to modify it accordingly. Its decision in effect requires the district court to disregard conflicting interests and to achieve a specific racial mix regardless of the costs to the educational system as a whole and to black children in particular.[6]

The court of appeals adopted too restrictive an interpretation of *Swann*. We submit that *Swann* does not preclude district courts from considering competing educational, social and economic costs or from holding, as the district court did, that "transportation of young children which 'risk[s] the health of the children or significantly impinge[s] on the educational process' is to be avoided" (Pet. App. A-116, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 30-31).[7] The issue, moreover, is surely one warranting plenary review by this Court. Lower courts, school boards, and governmental enforcement agencies are clearly in need of guidance regarding the proper interpretation of *Swann*.

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[6]The court of appeals' treatment of the disparate burden question is especially troublesome in view of that court's 1972 decision suggesting that this issue be brought to the attention of the district judge on remand (Pet. App. A-210), and Judge McCree's concurring opinion that stresses the importance of this consideration in fashioning relief (*id.* at A-222 to A-223).

[7]If, as we believe, the district court's interpretation of *Swann* is correct, the court of appeals' decision must be reversed. The court of appeals did not hold that the district court's findings regarding the impropriety of mandatory busing in grades K-4 were clearly erroneous. See *Pullman-Standard* v. *Swint*, No. 80-1190 (Apr. 27, 1982), slip op. 12-16.

2. The court of appeals' rejection of the middle school and high school pupil assignment plans also rests upon what we believe to be a misapplication of *Swann*. The appellate court decision was based solely on the district court's failure to use the system-wide black to white student ratio as the "starting point" in fashioning relief.[8] *Swann* approves the "very limited use" of such ratios as a remedial tool, but it expressly forbids courts from making attainment of these ratios an "inflexible requirement." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 25. "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole" (402 U.S. at 24). Judge Celebrezze correctly stated that the practical consequence of the court of appeals' ruling is to impose such a requirement here (Pet. App. A-34).

The projections for black enrollment in each middle school and comprehensive high school by 1984 demonstrate that the plan approved by the district court promised to be effective. Those data show that in the twenty-four middle schools black enrollment would range from 11.7% to 79.5% and that half of those schools would fall within the range mandated by the court of appeals order (17% to 47%

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[8]The district court's 15% of either race standard was not a "starting point" but a minimum standard. It was adopted upon the recommendation of plaintiffs' expert witness, Dr. Hugh Scott (Pet. App. A-118).

black).[9] At the ten comprehensive high schools black enrollment would range from 14.9% to 59.2% and half of those schools would fall within the range mandated by the court of appeals.[10] The district court was not obligated to devise a plan that insured that the racial composition of each school would reflect the racial composition of the system as a whole. "The clear import of * * * *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom." *Milliken* v. *Bradley, supra,* 418 U.S. at 740, 741; see also *Wright* v. *Council of Emporia,* 407 U.S. 451, 464 (1972); *Pasadena City Board of Education, supra,* 427 U.S. at 434. The contrary conclusion of the court below warrants this Court's review.

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[9]The projections for percentage black enrollment in the middle schools are: Joelton 39.5; Goodlettsville 20.1; Dupont (Jr.) 19.6; Neely's Bend 17.2; Ewing Park 70.8; Cumberland 60.8; Highland Heights 59.2; Meigs 79.5; East 24.8; Litton 27.3; DuPont (Sr.) 18.6; Donelson 14.8; Two Rivers 17.8; Cameron 17.1; Rose Park 76.7; Wright 11.7; Apollo 14.1; Antioch 14.0; McMurray 21.0; Moore 19.9; Pearl 77.4; Cohn 51.0; Bass 34.5; Bellevue 15.3 (J.A. 574) (J.A. refers to the joint appendix filed in the court of appeals).

[10]The projections for percentage black enrollment in the high schools are: Whites Creek 56.4; Goodlettsville-Madison 14.9; Maplewood 59.2; Stratford 31.6; McGavock 15.1; Glencliff 21.2; Overton 17.1; Hillsboro 27.7; Hillwood 30.7; Pearl-Cohn 57.7 (J.A. 575).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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